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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JAMES A. WILLIAMS,

PETITIONER,

vs.

STATE OF GEORGIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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QUESTIONS PRESENTED

1. Does the fact that the District Attorney's prior misconduct in one trial and improper submission of evidence in another trial caused two convictions of Petitioner which were subsequently reversed by the Georgia Supreme Court, combined with the mistrial declared during Petitioner's third trial on the same charge, constitute double jeopardy, so that further prosecution must be barred?

2. Does District Attorney Spencer Lawton's failure to provide a vital document under *Brady*, coupled with extremely prejudicial and improper statements which he made to the press, require that he and his assistants be removed from the case for violation of Petitioner's rights to due process and equal protection, since the District Attorney's actions will inevitably force Petitioner to accept a change of venue?

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IV.

CITATION TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Decision of the trial court dated November 2, 1987; Decision of the Supreme Court of Georgia dated May 26, 1988; Denial of Motion for Reconsideration, dated June 14, 1988. Copies of these opinions are attached hereto in the Appendix.

V.

STATEMENT OF JURISDICTION

This Petition requests review of a judgment from the Supreme Court of Georgia, dated May 26, 1988 and entered on June 14, 1988. In an Order dated June 14, 1988, the court denied Petitioner's Motion for Reconsideration. On June 15, 1988, the court granted Petitioner's Motion to Stay Remittitur and directed the clerk to withhold the transmittal of remittitur to the trial court for ninety days from the date of the court's judgment. The court directed the clerk further to withhold transmittal if, by the ninetieth day, Petitioner had filed an appeal or a petition for certiorari with this Court, at which time transmittal would be withheld until final disposition by this Court.

Jurisdiction for review is conferred upon this Court by 28 U.S.C. Section 1257(3).

VI.

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

VII.

STATEMENT OF THE CASE

Petitioner Williams, a prominent Savannah businessman, was indicted for murder in 1981. A resulting conviction was reversed by the Georgia Supreme Court, which stated, "We do so because we cannot and will not approve corruption of the truth-seeking function of the trial process. . . . We find that the State should have done more than it did to protect the Defendant's rights." *Williams v. State*, 250 Ga. 463, 466, 298 S.E.2d 492, 494 (1983) (*Williams I*). District Attorney Spencer Lawton had violated his *Brady* duty when he failed to produce part of a significant police report. The court specifically noted that the error was caused by the District Attorney, not by the lower court. *Id.*, 250 Ga. at 465, 298 S.E.2d at 493.

District Attorney Lawton prosecuted Petitioner a second time. Once again, the State Supreme Court reversed a conviction on two grounds. The District Attorney had twice solicited and presented improper evidence which was prejudicial to Petitioner. *Williams v. State*, 254 Ga. 508, 330 S.E.2d 353 (1985) (*Williams II*).

Mr. Lawton returned to prosecute Petitioner a third time. Under the shadows of Mr. Lawton's various improper acts and the news media's widespread publication of the case, this last trial ended in a court-declared mistrial because the jurors were unable to reach a unanimous verdict.

Since the night of the shooting, Petitioner has vigorously maintained that he was forced to shoot the decedent in self-defense after the decedent had first fired at Petitioner. Throughout all three trials, Mr. Lawton has contended that the decedent never fired a shot and that Petitioner shot the decedent and arranged the scene to make it look like the decedent had fired.

At each trial, the District Attorney presented witnesses to attempt to support his theory. He presented evidence that a gunpowder residue test of the decedent's hands was negative and that the decedent therefore could not have fired the weapon at Petitioner. In order to bolster the credibility of the gunpowder residue test, Mr. Lawton presented the police officer who was present at the scene after the shooting. In all three trials, the officer insisted that bags had been placed over the hands before the body was removed from the scene, in order to preserve any gunpowder residue which was present.

Before the first trial, Petitioner had requested that the District Attorney produce certain documents under *Brady v. Maryland*, 373 U.S. 83 (1963). In a motion dated August 6, 1981, Petitioner specifically requested "evidence, records or information which may be used to impeach any State witness or which may lead to evidence which might be used to impeach any witness, or which may detract in any manner from the probative force of the State's evidence." Petitioner's motion further specifically requested the production of "[a]ny and all records and/or information which could arguably be helpful or useful to the defense in impeaching or otherwise detracting from the probative force [of] the State's evidence or which could arguably lead to such records or information." Finally, Petitioner requested that the State "furnish to him any and all evidence of whatever type and kind that may be in its possession and which may be materially favorable to the Defendant, either directly or of an impeaching nature, within the purview of *Brady v. Maryland* and its progeny."

During the first two trials, Petitioner possessed no evidence to contradict the testimony that the hands had been properly bagged, and the State produced none. Thus, the juries were persuaded that Petitioner murdered the decedent. During the course of the *third* trial, Petitioner himself subpoenaed the hospital for the records on the decedent's body, which had been sent there after the shooting. The hospital produced the autopsy records which were on file. Included in the autopsy records was the hospital admitting sheet, which outlined the instructions given by the County Coroner. A copy of the sheet had been in the possession of the Coroner in his file since 1981. In fact,

the sheet was the top piece of paper in the Coroner's file on the decedent. The sheet contained vital exculpatory evidence which contradicted the reliability of the gunpowder residue test. The District Attorney, however, had failed to provide the sheet to Petitioner in response to Petitioner's request for such impeachment evidence.

The exculpatory nature of the sheet is readily apparent. On the face of the admitting sheet was a notation by the Emergency Room nurse, Marilyn Case, who attended to the body. She specifically noted that *she* bagged the hands at the request of the Coroner. This evidence directly contradicted the police officer's testimony that he had bagged the hands. Before the nurse bagged the hands hours after the shooting, the body had been moved and handled by numerous people. Any gunpowder residue was likely to have been removed before the protective bags were placed on the hands and before the hands were swabbed for the residue test. Thus, the negative results of the gunpowder residue test were meaningless. Even the District Attorney's own witness, Randall H. Riddell of the State Crime Lab in Atlanta, testified that it is important for the integrity of the test that the hands be bagged until they can be swabbed for residue.

Even after Petitioner produced Nurse Case at trial, Mr. Lawton exploited the disadvantage of Petitioner, who had just discovered the sheet, by attempting to impeach the exculpatory evidence. He continued to argue that the hands had been bagged at the scene and that the gunpowder residue test was reliable. As a result of the District Attorney's relentless abuse of

his *Brady* duties, the jury in the third trial was unable to agree unanimously upon an acquittal.

After the third trial, the District Attorney's office began investigating the information on the admitting sheet in order to undermine any future use of Nurse Case's testimony. An investigator from the District Attorney's office interviewed a former hospital employee, Angela Douglas, whose initials were noted on the vital sheet. Mrs. Douglas informed him that she remembered that the hands had not been bagged when the body first arrived in the Emergency Room. Mr. Lawton then notified the defense attorneys of this exculpatory evidence. Prior to that notification, and during the three trials, the defense attorneys had no knowledge that Mrs. Douglas had personally seen the body upon its arrival at the hospital and could corroborate the testimony of Nurse Case.

Mr. Lawton's misconduct did not stop with his *Brady* violation. Immediately subsequent to the third trial, and in the presence of numerous television cameras, the District Attorney stated, "So far as I see it, the score is 35-to-1 for conviction, and I am confident that if we bring it back and get a jury that is willing and able to decide, then we'll get the right result." Mr. Lawton persisted by later stating, "Two juries have voted unanimously for conviction. Another has voted 11-to-1 for conviction. In my opinion, therefore, there is substantial reason to believe Mr. Williams is guilty of the offense charged." These statements have been continuously repeated to the citizens of Petitioner's home county through both the television and newspaper media.

Petitioner moved to have the charges against him dismissed on the grounds that a fourth trial would

constitute double jeopardy under the United States Constitution, based upon Mr. Lawton's repeated misconduct. Petitioner alternatively moved to have Mr. Lawton disqualified from any further prosecution efforts, based upon Mr. Lawton's continued violation of his ethical and prosecutorial duties. Petitioner further raised the issue of Mr. Lawton's *Brady* violation, which inherently involves the issue of due process under the fourteenth amendment.

The trial court rejected both motions, and Petitioner appealed to the Supreme Court of Georgia, raising the same issues. The court impliedly ruled that no *Brady* violation occurred when Mr. Lawton failed to produce the hospital sheet. The court further ruled that the Double Jeopardy Clause was not invoked and that Mr. Lawton's statements to the press, although improper in part, did not require his disqualification. In his Motion for Reconsideration, Petitioner raised the claim that Mr. Lawton's actions violated Petitioner's rights to due process and equal protection under the U.S. Constitution, because Petitioner has a right to be tried in the county where the alleged crime occurred, which is Petitioner's home county and in which he has the reputation of a respected businessman. Because Mr. Lawton's misconduct and infectious remarks would force Petitioner to accept a change of venue in a subsequent prosecution, Petitioner argued that Mr. Lawton has deprived Petitioner of his constitutional rights. The Court denied Petitioner's Motion for Reconsideration.

VIII.

ARGUMENT AND CITATION OF AUTHORITY

I. THE STATE COURT ERRED IN FAILING TO HOLD THAT THE ACTIONS OF THE DISTRICT ATTORNEY, WHICH RESULTED IN TWO PRIOR OVERTURNED CONVICTIONS AND A MISTRIAL DURING A THIRD PROSECUTION, CONSTITUTE DOUBLE JEOPARDY.

"No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend. V. The protections afforded by the Double Jeopardy Clause of the fifth amendment are applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 74 (1969).

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88 (1957).

The long and repetitious history of this case clearly shows that a fourth prosecution of Petitioner will constitute double jeopardy. Any conduct on the part of the State which hints at the possibility of multiple prosecutions, prejudice, or harassment must be tested against the mandate of the Double Jeopardy Clause. Where prejudice is apparent, the State is barred from

pursuing further action against the accused. "[C]onsequently, as a general rule, the prosecutor is entitled to one and only one opportunity to require an accused to stand trial." *Arizona v. Washington*, 434 U.S. 497, 505 (1978). In close double jeopardy cases, reasonable doubts must be resolved in favor of the defendant. *Downum v. United States*, 372 U.S. 734, 738 (1963); *United States v. Gordy*, 526 F.2d 631, 637 (5th Cir. 1976).

The totality of actions by the District Attorney throughout this case has forced Petitioner to endure the expense and ordeal against which the fifth amendment is intended to protect. The State first charged Petitioner with murder in 1981. Mr. Lawton failed to produce the crucial hospital admitting sheet which was in the possession of the Coroner. Therefore, Petitioner was unable to introduce the exculpatory evidence contained therein at trial, and he was convicted. The Georgia Supreme Court reversed the conviction due to the District Attorney's *Brady* violation because he produced only a portion of a vital police report. *Williams I*, 250 Ga. at 466, 298 S.E.2d at 494.

The District Attorney prosecuted Petitioner a second time. Again, Mr. Lawton failed to produce the hospital form, so the exculpatory evidence was never presented to the jury. The Georgia Supreme Court again reversed a conviction, due to the District Attorney having solicited improper evidence from a witness and having staged an improper evidentiary demonstration during closing arguments. *Williams II*, 254 Ga. 508, 330 S.E.2d 353.

For a third time, Petitioner faced prosecution by Mr. Lawton. The District Attorney again failed to

produce the crucial hospital admitting sheet. Petitioner did not learn of the document's existence until during the trial. Because of Mr. Lawton's failure to produce the sheet earlier, Petitioner was unable to develop fully the significance of the report. The third trial (*Williams III*) ended in a court-declared mistrial after the jurors were unable to reach a unanimous verdict.

Although a defendant is usually not subjected to double jeopardy when the court declares a mistrial because the jury was unable to reach a verdict, *Cameron v. Caldwell*, 232 Ga. 611, 208 S.E.2d 441 (1974), certain exceptions exist. Even in cases where a defendant himself moves for a mistrial, the court will hold that the Double Jeopardy Clause applies if the motion for mistrial was prompted by "prosecutorial overreaching." Prosecutorial overreaching arises where the State, through the gross negligence or intentional misconduct of the district attorney, causes aggravated circumstances to develop which seriously prejudice a defendant. *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976); *United States v. Martin*, 561 F.2d 135 (8th Cir. 1977).

The extended history of this case clearly shows that Petitioner has been subjected to "embarrassment, expense and ordeal" which have caused him continuing anxiety. It is also clear that this ordeal has resulted from at least the gross negligence of the District Attorney. The instance of the third trial is no exception. Although the mistrial was declared because of a hung jury, the jury's inability to reach a unanimous verdict was caused by the prosecutorial overreaching of Mr. Lawton. A fourth trial would therefore constitute double jeopardy.

Mr. Lawton committed prosecutorial overreaching when he failed to produce the hospital sheet in violation of his *Brady* duty. In *Brady v. Maryland*, 373 U.S. 83 (1963), this Court held that where a defendant moves the State for production of evidence which is material to the guilt or innocence of the accused and which is in the possession of the State, the State is required to produce such documents. A violation of a *Brady* duty breaches the defendant's right to due process. *United States v. Agurs*, 427 U.S. 97, 107 (1976). Where a district attorney receives a specific and relevant request, the failure to respond is "seldom, if ever, excusable." *Id.* at 106. Where the material is obviously exculpatory, a district attorney must produce it for a defendant even if only a general request is made or if no request is made. *Id.* at 107-08. Petitioner timely provided the District Attorney with *Brady* requests in each trial.

Whether the sheet was actually in the hands of Mr. Lawton is irrelevant because it was in the possession of the State through the County Coroner. The District Attorney had a duty to know and was assigned constructive knowledge of the sheet and the Coroner's possession thereof. *See Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980); *Giglio v. United States*, 405 U.S. 150 (1972); *Luck v. State*, 163 Ga. App. 657, 659, 295 S.E.2d 584, 586 (1982).

ABA standards also assign to Mr. Lawton vicarious knowledge of the sheet.

> The prosecuting attorney shall disclose to the defense counsel any material or information within the prosecutor's possession or control which tends to negate the guilt of the ac-

> cused as to the offense charged . . . . The prosecuting attorney's obligations under the standard extend to material and information in the possession or control . . . of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecutor's office.

ABA Standards of Criminal Justice, Section 11-2.1(c), (d).

"[T]he *Brady* duty affects not only the office of the [prosecutor] but also any other investigative agencies of the Government which have gathered information as part of the case of the prosecution against the accused who seeks disclosure." *United States v. Eley*, 335 F. Supp. 353, 358 (N.D. Ga. 1972). The Chatham County Coroner is an investigative officer of the State. O.C.G.A. Sections 45-16-25, -27. He has possessed a copy of the admitting sheet in his autopsy files since 1981. Because the Coroner's possession is imputed to the District Attorney, Mr. Lawton was required by *Brady* to know of and to disclose this information to Petitioner. The District Attorney, however, failed to produce the admitting sheet.

Mr. Lawton's *Brady* violation of failing to produce the hospital sheet greatly harmed Petitioner. The District Attorney rests much of his case upon tests of the decedent's hands which showed no gunpower residue. The reliability of the crucial gunpower residue test hinges on whether the decedent's hands were bagged at the scene of the shooting in order to preserve any residue. Likewise, Petitioner's case hinges upon whether the police failed to place bags upon the

hands, and thus whether gunpower was once present but was removed in the handling of the body.

In all three trials, the District Attorney presented witnesses who unabashedly testified that the hands were bagged at the scene of the shooting. Petitioner was saddled with such testimony and had no means for disputing it during the first two trials. During the third trial, Petitioner, through his own efforts, discovered the admitting sheet after subpoenaing all hospital records on the decedent. Even after Petitioner discovered Nurse Case, who had bagged the hands at the hospital, and summoned her to testify, the District Attorney steadfastly adhered to his claim that the hands were bagged at the scene.

It was Mr. Lawton's own intentional act or gross negligence which caused the autopsy report not to be provided earlier. He then capitalized on this *Brady* violation by *intentionally* attempting to undermine the credibility, validity, and value of such information. Because Petitioner discovered the document during the trial, he was disadvantaged by having insufficient time to develop the information fully. As a result of the District Attorney's abuse of his *Brady* duties, the jury in *Williams III* was unable to unanimously agree upon an acquittal. Thus, the intentional and grossly negligent acts of the District Attorney caused the mistrial in *Williams III*, and a fourth trial would constitute double jeopardy.

The ever-important admitting sheet led to the post-*Williams III* discovery of a second hospital employee who remembered that the hands were not bagged when the body was admitted to the hospital. Had the District Attorney presented the admitting sheet before the first trial as required, the testimony of the

two employees could have been introduced long ago to corroborate each other and to lead to an acquittal.

Petitioner's showing of double jeopardy, however, does not rest solely upon the mistrial in *Williams III*. Rather, the lengthy history of this case, the prior actions of the District Attorney, and the Georgia Supreme Court's Opinions in the preceding stages show that double jeopardy would exist in *Williams IV*. The District Attorney's own intentional misconduct or gross negligence has been the cause of each retrial. Even if this Court should find that no single preceding prosecution would meet the level of double jeopardy, the combination of the three prior prosecutions exceeds that level. Over the course of the nearly eight-year history of this case, the District Attorney has been found to have twice committed reversible error by submitting improper evidence, has twice committed *Brady* violations, one of which continued through three trials, and has at least once affirmatively capitalized upon his *Brady* violation.

As a result, Petitioner has already faced three trials and has been subjected to the "embarrassment, expense and ordeal" connected therewith. The actions of the District Attorney have "compell[ed Petitioner] to live in a continuing state of anxiety and insecurity, as well as enhanc[ed] the possibility that even though innocent he may be found guilty." *Green*, 355 U.S. at 187-88. This Court should view the history of this case in totality, as Petitioner himself has viewed it for nearly eight years. Petitioner should not be held responsible for or punished because of the actions of the District Attorney.

II. THE GEORGIA SUPREME COURT ERRED IN FAILING TO DISQUALIFY THE DISTRICT ATTORNEY, WHOSE ACTIONS VIOLATED PETITIONER'S RIGHTS TO EQUAL PROTECTION AND DUE PROCESS, CONSTITUTE CLEAR VIOLATIONS OF HIS ETHICAL DUTIES, AND INDICATE A CLEAR INABILITY TO PERFORM PROPERLY HIS ROLE AS A STATE OFFICER.

The Georgia Constitution and statutory law mandate that a criminal defendant be tried in the county where the alleged crime occurred. Ga. Const. art. VI, sec. 2, para. 6; O.C.G.A. Section 17-2-2(a). Venue cannot be altered without the defendant's consent. *Patterson v. Faircloth*, 256 Ga. 489, 350 S.E.2d 243 (1986). The due process and equal protection clauses of the fourteenth amendment of the U.S. Constitution require that all defendants "stand on an equality" in court and that they not be subjected to invidious discrimination. *Griffin v. Illinois*, 351 U.S. 12, 17 (1955). The clauses prohibit a State from granting a right to some defendants and withholding the right from others. *Stump v. Bennett*, 398 F.2d 111 (8th Cir.), *cert. denied*, 393 U.S. 1001 (1968). Where a State action discriminates against a person's right to venue, the equal protection clause is violated. *Power Manufacturing Co. v. Saunders*, 274 U.S. 490 (1926).

Petitioner has a strong interest in maintaining venue in Chatham County, where the alleged crime occurred. Petitioner and his attorneys reside in that county, and a change in venue would cause greater expense and inconvenience to Petitioner. Furthermore, Petitioner is a respected businessman in Chatham County, and a venue change would thrust him before a jury unfamiliar with his reputation. Finally, Petitioner presented at the prior trials various

respected residents of Chatham County who testified about his reputation. A change of venue would render such testimony virtually worthless before a jury who is unfamiliar with the reputations of the character witnesses.

Mr. Lawton violated Petitioner's rights to due process and equal protection of the law because his pervasive and detrimental misconduct has so infected the community in Chatham County that a change in venue is almost certain to occur. *See Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *cert. denied*, 476 U.S. 1164 (1986). Mr. Lawton's misconduct has confronted Petitioner with a Hobson's Choice: he may either remain in Chatham County and face the bias which has been created by the effects of Mr. Lawton's misconduct, or he can seek a change of venue, which change would result in great inconvenience and the virtual debilitation of his character evidence before a jury of strangers. Because such a dilemma has arisen as the direct result of Mr. Lawton's misconduct, he has deprived Petitioner of equal protection of the law and of due process. Although there is no established remedy for such violations, the facts of this case justify either the dismissal of the charges or the disqualification of Mr. Lawton's office in any future prosecution on these charges.

The infectious nature of Mr. Lawton's conduct is apparent. During the seven years since the shooting incident, hundreds of newspaper articles have been written about Petitioner's prosecutions, many of which highlighted the evidence which was subsequently ruled inadmissible. Many also cited the evidence of the negative gunpowder residue test results, before Petitioner discovered the exculpatory hospital admitting sheet.

Many articles repeated the fact that Petitioner had been previously convicted and then had his convictions reversed. The case has also received extensive television coverage. The public's awareness of and sentiment against the case was obviously heightened by such publicity.

Immediately after the end of the third trial, Mr. Lawton made several statements on camera which were subsequently broadcast on television and printed in the newspapers. Lawton referred to the long history of the case when he stated, "So far as I see it, the score is 35-to-1 for conviction, and I'm confident that if we bring it back and get a jury that is willing and able to decide, then we'll get the right result." Lawton persisted by later stating, "Two juries have voted unanimously for conviction. Another has voted 11-to-1 for conviction. In my opinion, therefore, there is substantial reason to believe Mr. Williams is guilty of the offense charged."

The District Attorney committed misconduct on several grounds when he made the statements to the press. A prosecuting attorney is not the representative of a usual party to a controversy. Rather, he is the representative "of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . ." A prosecutor's goal and duty in a case, therefore, is not to win, but to see that justice is done. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88 (1934). The district attorney's standards for conduct in a case are more rigorous than those of a defense attorney:

> The freedom elsewhere wisely granted to a partisan advocate must be severely curtailed if the prosecutor's duties are to be properly discharged. The public prosecutor must recall that he occupies a dual role, being obligated, on the one hand, to furnish that adversary element essential to the informed decision of any controversy, but being possessed, on the other, of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice. Where the prosecutor is recreant to the trust implicit in his office, he undermines confidence, not only in his profession, but in government and the very ideal of justice itself.

Professional Responsibility: Report of the Joint Conference, 44 A.B.A.J. 1159, 1218 (1958).

The conduct of a prosecutor must be exemplary. *United States v. Mulherin*, 529 F. Supp. 916 (S.D. Ga. 1981), *aff'd*, 710 F.2d 731 (11th Cir. 1983), *cert. denied*, 465 U.S. 1034 (1984).

> A . . . district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law

> rests on the foundation: better the guilty escape than the innocent suffer.

Handford v. United States, 249 F.2d 295 (5th Cir. 1957).

Along with these general rules which strictly govern the actions of a district attorney, courts have enumerated several specific practices which must be avoided. First and foremost, it is improper for a district attorney to express a personal opinion as to the defendant's guilt. *Hoerner v. State*, 246 Ga. 374, 271 S.E.2d 458 (1980). According to Directory Rule 7-107(B)(6), a district attorney shall not make any out-of-court statement as to the guilt of an accused, if a reasonable person would expect the statement to be publicly disseminated.

Mr. Lawton clearly breached these rules when he made the two statements to the press. The statements were obviously personal opinions, containing such telltale phrases as "So far as I see it," "I'm confident," and "In my opinion." Mr. Lawton's opinion clearly addressed Mr. Williams' guilt, claiming that there was a "35-to-1" score for conviction and that he was confident a subsequent jury would render the "right" result. The Georgia Supreme Court ruled that the "right result" statement was improper because it stated Mr. Lawton's opinion on the merits of the case. See p. 20a. Mr. Lawton's second statement went even further: "In my opinion, therefore, there is substantial reason to believe that Mr. Williams is guilty of the offense charged."

Mr. Lawton violated the Directory Rule because he made the statements in a situation in which a reasonable person would have expected the statements

to be publicly disseminated. Both statements arose out of a highly publicized trial, and Mr. Lawton gave his opinion with a television camera only a few feet away and with news personnel interviewing him. As a reasonable person would expect, both statements were broadcast on television and printed in the newspapers.

Understandably, there are few cases in which a district attorney has made public comments which so patently violated his duty as the remarks in the present case. One particular case, however, is strikingly similar. In *In re J.S.*, 140 Vt. 230, 436 A.2d 772 (1981), the prosecutor made public statements which strongly indicated his personal belief of the defendant's guilt of a heinous crime, and the press published his remarks. The court held that the prosecutorial impropriety *required* disqualification.

Mr. Lawton has tried to justify his expression of his opinion of guilt by stating that he would have been acting unethically if he prosecuted without such a belief. His having an opinion, however, is irrelevant. His *expression* of that opinion is improper. In *Broznack v. State*, 109 Ga. 514, 35 S.E. 123 (1900), the court held that it was improper for the district attorney to state that he would not be prosecuting the case if he did not feel that the defendant was guilty. *See also United States v. Brunberger*, 431 F.2d 1062 (2d Cir. 1970).

A district attorney is also under the duty to refrain from making an argument that might be calculated unfairly to influence the jury or that is based on extrinsic and prejudicial matters. *Bland v. State*, 210 Ga. 100, 78 S.E.2d 51 (1953); *Parks v. State*, 254 Ga. 403, 330 S.E.2d 686 (1985). Mr. Lawton violated these

tenets by having grossly misstated the history of the case and by having totally ignored Opinions rendered by the Georgia Supreme Court in this case. Although the first two juries convicted Mr. Williams, the court held that the verdicts were void because they were founded upon prosecutorial misconduct and improper evidence. Thus, the verdicts of the first two juries do not exist and cannot be relied upon for any reason.

In total disregard of the strongly worded Opinions of the Georgia Supreme Court, Mr. Lawton directly relied upon the first two convictions in order to give merit to his case. His first quote stated, "So far as I see it, the score is 35-to-1 for conviction . . . ." Mr. Lawton grossly misstated the law and the history of the case when he compiled both the 24 void votes from the first two trials and the 12 meaningless votes from the hung jury to support his opinion that he would be able to achieve the "right result" at the next trial.

In his second statement, Mr. Lawton said, "Two juries have voted unanimously for conviction. Another has voted 11-to-1 for conviction. In my opinion, therefore, there is substantial reason to believe Mr. Williams is guilty of the offense charged." He opines that there is substantial reason to believe that Mr. Williams is guilty because 35 previous jurors have felt that way. Mr. Lawton conveniently failed to mention, however, that 24 of those jurors were led to their guilty verdicts through his own prosecutorial misconduct and improper evidence.

Mr. Lawton's direct reliance upon blatant falsifications of the legal consequence of the three trials was calculated unfairly to influence the entire community of Savannah and the future potential jurors

in the fourth trial of Mr. Williams. The status of the three prior cases will be inadmissible in the fourth trial, and Mr. Lawton clearly injected extrinsic and prejudicial matters into his argument before the press.

Furthermore, a district attorney should not appeal to the fears and prejudices of a jury. *Collins v. State*, 86 Ga. App. 157, 71 S.E.2d 99 (1952). Mr. Lawton's statements violated his duty because they played upon the public's growing dislike for numerous conviction reversals. Furthermore, Mr. Lawton capitalized upon the public's general misunderstanding of the need for and reasons behind conviction reversals. His reliance upon such extrinsic and prejudicial matters were clearly calculated unfairly to influence the public and any future jury.

Mr. Lawton will most likely argue that he did not intend to prejudice Mr. Williams—that he was merely "carrying out his job." Because the district attorney's job is to seek justice and obey the rules, however, this defense is inapplicable. When a district attorney violates the rules of prosecutorial conduct, his intent is irrelevant. In *Griffin v. Unites States*, 183 F.2d 990 (D.C. Cir. 1950), the court stated that the good faith of a prosecutor is not a factor, because fairness to the defendant is the goal in assuring that a prosecutor follow the rules. Thus, the court reversed a conviction and granted a new trial, irrespective of the prosecutor's intent or good faith. Another case emphasized the irrelevance of a prosecutor's intent: "We cannot understand how the accused is interested in the personal character of his accuser. [I]t hurts the defendant just as much to have prejudicial blasts come from the trumpet of the angel Gabriel." *United States v. Nettl*, 121 F.2d 927 (3d Cir. 1941).

Mr. Lawton's *Brady* violations further violated Petitioner's right to due process. *Agurs*, 427 U.S. at 107. Such "procedure passes 'beyond the line of tolerable imperfection and falls into the field of fundamental unfairness.'" *Barber v. Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964). The harm from such constitutional violations is damaging regardless of whether the omission was intentional or negligent. *Id.*

Because there is no specific remedy for such violations of due process and equal protection, a proper redress should be fashioned. Due to the egregiousness of Mr. Lawton's misconduct, his removal from the case is both warranted and required in order to protect the rights of Mr. Williams. In *Davenport v. State*, 157 Ga. App. 704, 278 S.E.2d 440 (1981), the court reversed a conviction and stated that the disqualification of the district attorney's office was required to ensure the defendant's rights to due process. The court did not even address the actual misconduct of the district attorney; rather, it stated that disqualification was necessary because of the *appearance* of impropriety. *See also United States v. Omni International Corp.*, 634 F. Supp. 1414 (D. Md. 1986).

At this point, the removal of Mr. Lawton's office from the case is necessary to protect Mr. Williams' rights. Because of the present status of the case, it is unnecessary for this Court to declare a mistrial or to reverse a conviction as a result of Mr. Lawton's misconduct. Instead, Mr. Lawton and his office must be removed because Petitioner is facing a fourth trial soon after Mr. Lawton's injurious comments were repeatedly broadcast to the community. "[D]epartures from the proper role of a prosecutor are destructive

to the rights of the parties and result in unnecessary delays and even retrials . . . ." Therefore, such prosecutorial impropriety requires disqualification. *In re J.S.*, 140 Vt. 230, 436 A.2d 772.

Where a district attorney makes improper statements during trial, the right to grant a mistrial should be liberally exercised. *Powell v. State*, 179 Ga. 401, 176 S.E. 29 (1934). Likewise, this Court should not hesitate to remove Mr. Lawton's office from further prosecutions, because he blatantly performed misconduct in the presence of the news media.

Petitioner is entitled to a remedy which will remove the threat of future prosecutorial misconduct and violations of due process and equal protection. He has the right to a fair trial and to be prosecuted by a district attorney with an open mind and without a vendetta. The unmitigated vengeance with which Mr. Lawton has prosecuted this case is evidenced by these remarks and other conduct throughout the three former trials. The two former convictions were based upon his misconduct, and when the convictions were reversed to his chagrin, he continued to rely upon the verdicts to support his position for future trials.

The removal of Mr. Lawton's office is necessary to prevent such future misconduct. Some of the damage which has already been done and the facts which have been patently skewed cannot be corrected by removal, but disqualification will at least guarantee that Mr. Lawton will not be able to continue such actions throughout Mr. Williams' fourth trial. Furthermore, the press will continue to publicize this case as it progresses. So long as Mr. Lawton remains on this case, he will continue to have opportunities to make further such statements, and the television will con-

tinue to rerun his former statements, to the added detriment of Mr. Williams.

The redress of disqualification is not even so extreme as a reversal of a conviction. By removing Mr. Lawton's office, this Court will not be changing the status of the case. Rather, Mr. Williams would merely have his case dealt with by a new prosecution team—one that will be able to view the case with unbiased advocacy and follow its duties as laid down by the law.

> There is no doubt but that the delay created by [removal] is regrettable, but the consequences of failing to take steps to remedy the prejudice now would jeopardize the proceedings at a later time when the prospects of delay would be multiplied and the consequences probably more drastic with respect to the rights of the defendant or the people of the State . . . .

In re J.S., 140 Vt. 230, 436 A.2d 772.

IX.

CONCLUSION

Petitioner will be subjected to double jeopardy if he is forced to face a fourth trial. Mr. Lawton's intentional actions or gross negligence caused Petitioner to be without vital exculpatory evidence until during the third trial. As a result of this great disadvantage caused by the District Attorney, the jury in the third trial was unable to reach a unanimous decision for acquittal. Consequently, the court declared a mistrial. Thus, *Williams III* ended in a mistrial caused by pro-

secutorial overreaching, and to retry Petitioner would amount to double jeopardy.

Furthermore, the lengthy history of this case in totality also establishes the prerequisites to double jeopardy. In *Williams I*, Mr. Lawton committed *Brady* violations which caused the Georgia Supreme Court to reverse a conviction. In *Williams II*, Mr. Lawton twice solicited improper evidence, again causing the court to reverse a conviction. During the course of both trials, Petitioner was saddled with the lack of the exculpatory evidence of the nurse who bagged the decedent's hands. The nurse's absence was the result of a second *Brady* violation by Mr. Lawton. Mr. Lawton prosecuted Petitioner a third time, during the course of which Petitioner discovered the nurse. Even after her discovery, Mr. Lawton vigorously attempted to discredit her testimony. As a result of a hung jury, a mistrial was declared. When this Court reviews the intentional or grossly negligent misconduct of Mr. Lawton, it becomes obvious that Petitioner will be put in jeopardy at least twice if he is forced to endure *Williams IV*. Thus, this Court should dismiss the indictment against Petitioner.

In the alternative, this Court should disqualify Mr. Lawton from any further prosecution in the case, because his continuing involvement, combined with his earlier misconduct, will surely require a change of venue. Petitioner has a right to maintain venue in Chatham County, and if he is forced to accept a change because of Mr. Lawton's conduct, he will be deprived of his rights to due process and equal protection of the laws. Mr. Lawton's statements to television personnel, in which he bragged of a "35-to-1" score, were in violation of several basic rules of

prosecutorial conduct. His actions were inexcusable, especially in light of the strict standards which govern prosecutors.

Furthermore, the District Attorney should be disqualified because of his *Brady* violation, which deprived Petitioner of his right to due process. The County Coroner has maintained a copy of that sheet in his files since 1981. Thus, the District Attorney has had constructive possession of the sheet since before *Williams I*. At the outset, Petitioner requested that the District Attorney produce all exculpatory and impeaching evidence, yet Mr. Lawton failed to produce the sheet. Regardless of whether the omission was intentional or grossly negligent, it constituted a violation of *Brady*. Petitioner clearly suffered harm as a result of this omission, because the evidence struck at the heart of the District Attorney's case, a case which Mr. Lawton now wants to prosecute a fourth time. This Court should disqualify Mr. Lawton and his staff because of this glaring violation.

WHEREFORE, Petitioner James A. Williams respectfully requests that this Court grant certiorari, reverse the holding of the lower court, and remand with direction to either dismiss the indictment or disqualify the District Attorney and his staff.

Respectfully submitted this 12th day of August, 1988.

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APPENDIX

APPENDIX A

IN THE SUPERIOR COURT OF CHATHAM COUNTY
STATE OF GEORGIA

STATE OF GEORGIA	)	
	)	
VS	)	INDICTMENT NO.
	)	081-34982-H
JAMES A. WILLIAMS,	)	
	)	
DEFENDANT	)	

ORDER ON DEFENDANT'S MOTIONS
AS TO
DOUBLE JEOPARDY
AND
DISQUALIFICATION OF DISTRICT ATTORNEY

Defendant James A. Williams was indicted for the murder of one Danny Lewis Hansford on May 2, 1981, by the Chatham County Grand Jury. The indictment was filed in Superior Court June 12, 1981.

Defendant was tried by a jury and convicted. This conviction was overturned by the Supreme Court of Georgia June 4, 1983. *Williams v. State,* 250 Ga. 463.

Subsequently defendant was tried by a jury and convicted. He appealed to the Supreme Court of Georgia and the Supreme Court of Georgia on June 10, 1985, reversed the second conviction. *Williams v. State,* 254 Ga. 508.

Thereafter a third jury trial was held. The issues went to the jury but the jury was unable to reach a unanimous verdict which resulted in the Court declaring a mistrial.

Defendant now files one, a motion claiming double jeopardy and two, a motion seeking to disqualify the District Attorney of the Eastern Judicial Circuit from prosecuting the indictment.

ONE - DOUBLE JEOPARDY

There is no double jeopardy in the case subjudice. The errors claimed by defendant in the first two trials as being prosecutorial misconduct have been corrected by the Appellate Court. In the original and second trials defendant had his guilt or innocence determined by the fact finder he sought to determine the issues, the jury. No mistrial occurred in these two cases. There was no prosecutorial misconduct that prevented the jury from deciding the issues, although the jury was allowed to evaluate evidence by the trial court which the Appellate Court ruled to be inappropriate. Prosecutorial misconduct is not applicable to cases which have been terminated by the findings of the jury and corrected by an appeal of defendant.

The third trial which resulted in a mistrial came as a result of one juror being unable to agree with eleven other jurors as to the verdict. Our law requires juries to arrive at a unanimous verdict that is, all twelve must agree upon the verdict. Where there is no such verdict and the trial court determines in its discretion that a unanimous verdict cannot be agreed upon by the jury, a mistrial is appropriate.

Defendant has alleged misconduct on the part of the District Attorney in failing to provide an admission page of Candler Hospital which authorizes an autopsy by the coroner of Chatham County to be performed on the person allegedly killed by defendant. This admission page shows that the hands of the deceased were not bagged prior to the body's arrival at the hospital but that the hands were bagged by a Candler nurse. In the previous trials the testimony of the police was to the effect that they, the police, had bagged the hands prior to the body being transported from the crime scene.

The importance of the evidence goes to the issue of whether or not the deceased fired a pistol at defendant

as defendant contends or whether or not the deceased fired no gun as contended by the State.

Defendant contends that this admission sheet should have been produced by the State as part of the coroner's report under a "Brady" discovery motion. Defendant contends that the evidence would be supportive of defendant's factual contentions as well as being impeachment evidence to the testimony of the police.

However in the trial of the third case defendant discovered the admission page of Candler Hospital and introduced the document into evidence for the jury to consider in their deliberations of the facts. Accepting as fact that the admission sheet was in control of the District Attorney through the coroner's records, the failure of the District Attorney was not a causal factor in the mistrial resulting from prosecutorial misconduct.

As to the cases one and two, again accepting as fact that the District Attorney was in possession of the document through the coroner's records, the defendant was not denied his trial by jury.

> "The double jeopardy goal of "protect[ing] an individual from being subjected to the hazards of trial and possible conviction more than once" does not amount to a guarantee that a defendant will have to undergo only one trial on the charges against him. As a matter of practical necessity, the clause generally does not prohibit the retrial of a defendant after the reversal of his conviction on appeal; "[i]t would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceeding leading to conviction." Similarly, the double jeopardy clause does not absolutely bar retrial after the declaration of a mistrial.
>
> However, because a mistrial aborts a defendant's first trial prior to the return of a verdict, retrial fol-

lowing a mistrial implicates a second double jeopardy concern that retrial following a reversal does not involve. That concern is the defendant's "valued right to have his trial completed by a particular tribunal. . . ." Reiss, Prosecutorial Intent, 135 University of Pennsylvania Law Review, 1422-23, (1987) and cases cited therein.

Defendant having received a jury verdict in the first two cases he was not under present existing law placed in double jeopardy as a result of prosecutorial misconduct. The mistrial that occurred at the third trial did not result from prosecutorial misconduct but resulted from the inability of the jury to arrive at a unanimous verdict. The facts do not warrant the conclusion that there was intention on the part of the District Attorney to deprive the defendant of a fair trial at any trial or that the District Attorney caused the mistrial in the third trial.

Defendant's motion on the grounds that he has been placed in double jeopardy and is entitled to acquittal is hereby denied. *Fuggit v. State,* 253 Ga. 311; *Morris v. State,* 180 Ga. App. 896; *Hampton v. State,* 179 Ga. App. 14; *Benford v. State,* 164 Ga. App. 733; *Studyvent v. State,* 153 Ga. App. 161.

TWO - DISQUALIFICATION OF DISTRICT ATTORNEY

Defendant seeks to have the District Attorney disqualified for various reasons including comments to the T.V. news media which it is alleged constituted personal feelings of the District Attorney that Defendant Williams was guilty; that the score was 35 to 1 for conviction and that a subsequent jury would render the right result. These statements by the District Attorney to the T.V. media were stated shortly after the jury had failed to arrive at a verdict in the third trial of Defendant Williams.

It is of course improper in the trial of a case for the District Attorney to express a personal opinion as to the

defendant's guilt although it is proper to draw conclusions as to defendant's guilt from the evidence in the trial. *Hoerner v. State,* 246 Ga. 374, 375.

It is also improper for either the prosecuting attorney or the defense attorney to comment upon the guilt or innocence of the defendant. Such is a violation of professional standard of ethics.

The attorneys for both parties have extensively argued the case and have extensively set forth the alleged improprieties. The Court has viewed the video tapes of each local T.V. station covering the comments of Mr. Lawton and defense counsel. The Court has reviewed the monumental newspaper articles appearing throughout the State regarding the "Williams Trial" including the original coverage of the first trial in which counsel for the defense were attorneys other than those presently representing defendant.

This case was been tried in the news media many more times than it has been tried in the courtroom with both sides contributing to the trial by media. Defendant and defendant's lawyers have contributed their views of the trials and the evidence as shown by a few of the following excerpts from the news print media reports.

> "Lawyer wants Williams trial to be moved."
>
> " 'A change of venue motion is certainly possible and he will probably file one.' Attorney Frank W. Seiler told Senior Superior Court Judge George E. Oliver." (April 22, 1987)
>
> "If the DA does (retry the case), we'll be here," said defense co-counsel Don Samuel of Atlanta. "I'm confident we can (acquit Williams) - if we can get a jury to pay attention to the evidence and not the prejudice." (June 9, 1987)
>
> "Yes, I'm disappointed because I thought we had the kind of evidence it takes to acquit the

> man," lead defense lawyer Frank Seiler said. "Obviously, we wanted an acquittal. We felt we had an excellent chance at an acquittal." (June 10, 1987)

Defendant Williams has on occasions blamed the news media for his plight as he talked to the news media.

> "I was found guilty mainly because of what they (the jury) saw on television and what they read in the newspapers before the trial."
>
> "We're going to win this thing, because I know I'm right." (Jan. 5, 1984)
>
> "I think we should have a change of venue," he said. "I think Savannah has been pretty much brainwashed (against me) by the news media." (April 22, 1987)
>
> The defendant has accused the local courts, "I'm very glad the Supreme Court has seen the justice in my case, unlike the local courts. The truth always comes out." (July 4, 1985)

As demonstrated by the record in the many news accounts therein neither party is in position to cast stones upon the other party.

The Court can but conclude that defendant has actively participated in pretrial and post trial publicity to proclaim his innocence of all charges in the indictment.

The Court also concludes that defense counsel also participated in the post trial publicity of the third trial discussing the sufficiency of the evidence to acquit Mr. Williams, although defense counsel's remarks may not approach the guilt statements they lay at the feet of the District Attorney.

Accepting as fact that the District Attorney's remarks reached the unacceptable standard of commenting on the

guilt of defendant thereby violating the ethical standards prohibiting such comment, such does not disqualify the District Attorney from prosecuting the case. He may be subject to the forum of the State Bar Association that is given the duty to consider these alleged violations.

It is the ruling of the trial court that the alleged prosecutorial misconduct is insufficient to support the contentions of defendant that Mr. Lawton the District Attorney for the Eastern Judicial Circuit should be removed. The Court denies defendant's motion and holds that Mr. Lawton may continue to prosecute Mr. Williams in the pending indictment for the murder of one Danny Lewis Hansford.

SO ORDERED, this 2nd day of November, 1987.

/s/ James W. Head
JAMES W. HEAD, JUDGE
SUPERIOR COURT E.J.C.,
GEORGIA

APPENDIX B

In the Supreme Court of Georgia

Decided: May 26, 1988

45351. WILLIAMS v. THE STATE.

MARSHALL, Chief Justice.

This case comes to this court as a direct appeal, see generally *Patterson v. State,* 248 Ga. 875 (287 SE2d 7) (1982), from the trial court's denial of the appellant Williams' plea in bar in which he contends that the state, by reason of operation of the Double Jeopardy Clause, is precluded from subjecting him to retrial on a charge of murder following occurrence of the following three events in this case: (1) reversal by this court of the appellant's initial conviction in his direct appeal thereof in *Williams v. State,* 250 Ga. 463 (298 SE2d 492) (1983) (*Williams I*); (2) reversal in *Williams v. State,* 254 Ga. 508 (330 SE2d 353) (1985) (*Williams II*) of the conviction that was obtained against the appellant in the trial conducted after rendition of the decision in *Williams I*; and (3) the trial court's declaration of a mistrial due to the inability of the jury to reach a unanimous verdict in the retrial held after *Williams II.*

In this appeal, the appellant enumerates error, not only upon the denial of his plea of double jeopardy, but also upon the trial court's denial of another motion filed by the appellant in which he seeks the disqualification of the district attorney and his staff in this case. For reasons which follow, we affirm the trial court's denial of both motions.

Statement of Facts

From a reading of this Court's opinions in *Williams I* and *Williams II,* and a review of the record in the present

appeal, the facts of this case, including but not limited to the evidence admitted at the trial-level proceedings, can be stated as follows:

The victim, Danny Hansford, was a frequent house guest of the appellant, and the two of them were engaged in a homosexual relationship.

The victim had an explosive temper, and on April 3, 1981 (approximately one month prior to the victim's death), the appellant testified that the victim went into a drug-and-alcohol-induced rage and shot a hole into the floor.

The appellant reported the April 3rd incident to the police on the night of its occurrence. Corporal M. J. Anderson of the Savannah Police Department was the investigating officer, and he testified at the initial trial that when he arrived at the scene, although he found a bullet hole in the floor underneath the carpet in the room in which the appellant stated the shooting occurred, he could not determine whether it " 'was a new type of gunshot or was an old one.' " 250 Ga. at 464. In closing argument, the prosecutor contended that the incident was thus contrived as a prelude to the eventual murder of the victim one month thence.

In the early morning hours of May 2, 1981, the Savannah Police Department received another telephone call from the appellant, in which he stated that he had been involved in a shooting and that the police should be sent.

Corporal Anderson, again the investigating police officer, arrived at the appellant's house within minutes after the call was received. He testified that he found the victim lying face down with his right hand above his head and a pistol under his hand; the victim had no discernible pulse and was not breathing. He had been shot once in the chest, once in the back, and once in the head.

The appellant's trial testimony was that the victim had shot at him when he, the appellant, was seated behind his

desk, and, in self-defense, the appellant then fired three quick shots into the deceased.

As stated in *Williams I*, the state's contention at trial was that the appellant "shot the victim with one gun which he placed on his desk, then shot at his desk and chair with a second gun, and pulled the victim's right hand from under his body and placed the second gun under the victim's hand." Id.

Circumstantial evidence consistent with this hypothesis included testimony by the police that the blood found on the victim's right wrist and hand, as well as the blood found on the gun used by him, had been smeared thereon. And, there was no blood found on the floor in the vicinity of the victim's right hand, although blood was found on the floor underneath the victim. In addition, bullet holes in the floor corresponded to gunshot wounds to the victim's back and head when the victim's head was placed in a position facing to the right; as the corpse was found by the police, the victim's head was facing to the left. Further, the leg of a chair sitting upright was on the victim's pant leg, the pistol used by the appellant was found on the appellant's desk, and paper fragments were found on top of this pistol. Finally, tests of the victim's right hand showed no gun-powder residue.

Prior to the initial trial, defense counsel received a copy of portions of the April 3rd incident report pursuant to an OCGA § 17-7-210 request by the defense for statements made by the appellant while in police custody. These documents were furnished to the defense after the trial court had conducted an in-camera inspection of the incident report. Prior to the giving of the jury charge, defense counsel specifically inquired of the prosecutor as to whether any portion of the April 3rd incident report would "take away from" or "not support" Corporal Anderson's trial testimony concerning the freshness of the bullet hole. Id. The prosecutor responded in the negative.

The foregoing statement of the prosecutor was, however, factually inaccurate. As noted in *Williams I*, although Corporal Anderson's testimony was that he could not determine whether the bullet hole found on April 3rd was " 'a fresh or an old one,' " it was ascertained subsequently that contained within Corporal Anderson's April 3rd incident report was a written statement by him that the gunshot hole found in the floor was "fresh." Id.

It was held in *Williams I* that a new trial was, therefore, required under *Brady v. Maryland*, 373 U.S. 83 (83 SC 1194, 10 LE2d 215) (1963), even though the undisclosed evidence may not have created "a reasonable doubt of guilt which did not otherwise exist." 250 Ga. at 465. More specifically, it was held that, even though the April 3rd incident was not directly in issue in appellant's trial, the defense had made a specific, albeit belated, oral request for information concerning any discrepancy between the police officer's testimony and the contents of his incident report, and there in fact existed a "patent discrepancy" between the two. Id. at 466. In addition, as previously noted, the prosecution utilized the police officer's testimony on this point in support of the state's case-in-chief.

However, as stated in *Williams I*, the investigating officer's testimony "may or may not have been" intentionally false. Id. And, it is clear that no intentional "corruption of the truth-seeking function of the trial process" by the prosecutor has been established here. Id. In this regard, the prosecutor has subsequently testified that the statement made by him during the appellant's first trial, regarding the lack of inconsistency between the earlier incident report and the investigating officer's trial testimony, was attributable to a lapse of memory on his part and was not an intentional misstatement. This testimony finds corroboration in the fact that the trial judge, who conducted an in-camera inspection of the incident report, apparently also failed to recall the inconsistency.

The murder conviction obtained against the appellant at his second trial was reversed in *Williams II* on the ground that the trial court erred in allowing a Savannah detective, appearing as an expert witness on behalf of the state, to testify as to certain conclusions reached by him as a result of certain proved facts in the case. Specifically, based on facts in evidence, this witness testified, by way of expert conclusion on his part: (1) that the victim's head had been moved after he fired his pistol; (2) that the victim would have been unable to move the chair over his pants leg after he had been shot; and (3) that, by virtue of the location of the paper fragment, the appellant must have placed his pistol on the desk before the victim's pistol was fired over the desk.

It was held in *Williams II* that the trial court's admission of this testimony, concerning these conclusions of the expert witness, was in violation of the rule, found in Georgia's law of evidence, that an expert witness is allowed to testify only as to those conclusions which are " 'beyond the ken of the average layman.' *Fordham* [*v. State* 254 Ga. 59, 60 (325 SE2d 755) (1985)]." 254 Ga. at 510. The majority of this Court held in Division 2 of *Williams II* that these conclusions did not fit within that category, and a new trial was therefore required, notwithstanding the holding in Division 1 that the evidence authorized a rational trier of fact in finding the appellant guilty beyond a reasonable doubt.

It was held in Division 3 of *Williams II* that a demonstration by the prosecutor of the pull of the victim's handgun should have taken place during the evidentiary phase of the trial, rather than in closing argument to the jury. However, the question of whether this error would have constituted reversible error in and of itself was expressly reserved.

In *Williams II*, it was noted, as in *Williams I*, that the state produced evidence of the negative results of the gun-

powder-residue test performed on the victim's hands. However, it was also noted in *Williams II* that "[a]n expert witness for appellant testified that the type of pistol that the victim allegedly used in the attack produced residue on the hand of the person firing the gun only fifty percent of the time." Id.

At the third trial, as we have previously stated, a mistrial was declared by the trial court due to the inability of the jury to reach a unanimous verdict; the jury vote was, in fact, 11-to-1 for conviction.

During the course of the third trial, a subpoena issued by the defense for all hospital records resulted in the production of an emergency-room admitting sheet from the hospital to which the deceased was taken. A notation on this sheet seemed to indicate that the victim's hands were not bagged by the police at the scene of the crime, as previously testified to by the police; but rather, this notation, with some ambiguity, indicated that the victim's hands were bagged by medical personnel in the emergency room of the hospital to which the victim was taken.[1]

Although the appellant made a request under OCGA § 17-7-211 (a) for a copy of the county coroner's autopsy report, this emergency-room form was not in the prosecutor's file, and was thus not submitted to the appellant as part of the autopsy report. Although the appellant vigorously contends that the emergency-room form is a component part of an autopsy report within the legal definition thereof, the statutory and case law on this subject fail to

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[1] This ambiguity arose from the fact that the emergency-room nurse who apparently bagged the victim's hands placed the notation of "hands bagged" under the heading of "nurse assessment" rather than under "orders and treatment." The former category pertains to things observed by the nurse; the latter category was the appropriate place for the nurse to have noted the fact that she bagged the victim's hands in the emergency room.

support this assertion.[2] In addition, present defense counsel, during approximately four years of representing the appellant, did not complain of the omission of this form from the autopsy report produced by the state. And, prior defense counsel testified that such forms are not generally considered part of an autopsy report, as did experts in the fields of forensic science and medicine.

At the third trial, the appellant contended that in view of the fact that the victim's hands were not bagged until the corpse was taken to the hospital emergency room, the negative results of the gunpowder-residue test were meaningless, in view of the likelihood of removal of any gunpowder residue by police officers, funeral-home personnel, and hospital employees. In response, the prosecutor, in reliance on the previously noted ambiguity in this hospital record, see n. 1, supra, argued that the appellant's contention in this regard should be rejected.

Immediately after termination of the third trial, the prosecutor was apparently besieged by representatives of the media, and, in response to questioning, he made statements which were subsequently broadcast on television and printed in the newspapers. Referring to the history of this case, the prosecutor stated, "So far as I see it, the score is 35-to-1 for conviction, and I'm confident that if we bring it back and get a jury that is willing and able to decide, then we'll get the right result." He further stated, "Two juries have voted unanimously for conviction. Another has

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[2] An autopsy report is specifically stated to be a scientific report under OCGA § 17-7-211 (a). "Autopsy" is defined in OCGA § 45-16-21 (1) as "the dissection of a dead body and the removal and examination of bone, tissue, organs, and foreign objects for the purpose of determining the cause of death and circumstances surrounding the same." "In *State v. Madigan*, 249 Ga. 571, 574, fn. 2 (292 SE2d 406) (1982), . . . [w]e noted that the element common to the examples of scientific reports listed in OCGA § 17-7-211 . . . was 'that each includes the examiner's findings based on scientific analysis or his or her opinion.' " *Williams v. State*, 251 Ga. 749, 754 (3) (312 SE2d 40) (1983).

voted 11-to-1 for conviction. In my opinion, therefore, there is substantial reason to believe Mr. Williams is guilty of the offense charged."

After the conclusion of the third trial, the prosecution subsequently located another hospital employee whose initials also appeared on the emergency-room form, and the statement given by this hospital employee corroborated the proffered fact that the victim's hands had been bagged in the emergency room. The prosecution, in turn, informed the defense of the discovery of this corroborating witness. *Held:*

1. The issue formulated by the appellant, in the argument and citation of authority advanced by him in support of his first enumeration of error, is whether prosecutorial misconduct has occurred in this case and, if so, is of such character as to give rise to the bar of double jeopardy, thereby erecting a constitutional prohibition against the state's subjecting the appellant to further retrial on the present murder charge.

In addressing this argument, it should be recognized at the outset that, under both state and federal criminal law, it is a quantum leap from a conclusion that the reversal of a criminal conviction is necessary, to a holding that, as a result of the error or errors upon which the reversal is predicated, the Double Jeopardy Clause erects a constitutional barrier to further prosecution of the defendant. In this regard, it is a well-established tenet underlying the Double Jeopardy Clause that to bar retrial of a criminal defendant, on the sole ground that trial error necessitates reversal of the conviction, is far too high a price for society to pay for the vindication of the rights of criminal defendants under our scheme of government, and was never intended by the Double Jeopardy Clause. See *Oregon v. Kentucky,* 456 U.S. 667 (102 SC 2883, 72 LE2d 416) (1982) and cits.

It has been recognized in many cases that the primary purpose underlying the Double Jeopardy Clause is to prohibit the retrial of a criminal defendant where the prosecution has, at the initial trial, produced insufficient evidence to sustain a conviction. E.g., *Burks v. United States,* 437 U.S. 1 (98 SC 2141, 57 LE2d 1) (1978); *Hall v. State,* 244 Ga. 86 (5) (259 SE2d 41) (1979). The general rule is that retrial of the defendant is not barred where reversal of the conviction results from trial error rather than evidentiary insufficiency. *Burks v. United States,* supra; *Hall v. State,* supra; OCGA § 16-1-8 (d)(2). And, although it is generally the rule that by making a motion for mistrial the defendant thereby waives any claim of double jeopardy, it is not surprising that another class of cases, in which the Double Jeopardy Clause stands as a bar to retrial of the defendant, is where the prosecutor has goaded the defense into making a motion for a mistrial in order for the prosecution to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial. E.g., *Oregon v. Kentucky,* supra; *United States v. Martin,* 561 F2d 135 (8th Cir. 1977); *Fugitt v. State,* 253 Ga. 311 (319 SE2d 829) (1984). See also *State v. Whitehead,* 184 Ga. App. 162, 163 (361 SE2d 41) (1987). But see *United States v. Kessler,* 530 F2d 1246 (5) (5th Cir. 1976).[3]

Here, the appellant's convictions have been reversed in *Williams I* and *Williams II* for trial error and not evi-

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[3] *Kessler* holds that retrial of the defendant is barred under the Double Jeopardy Clause where the prosecutor, through gross negligence, causes aggravated circumstances to develop which seriously prejudice the defendant, causing him to believe that continuation of the tainted proceeding would result in conviction. As authority for the proposition that retrial can be barred under the Double Jeopardy Clause as a result of gross prosecutorial negligence, *Kessler* cites *United States v. Beasley,* 479 F2d 1124, 1126 (5th Cir. 1973). *Beasley,* in turn, cites *Wade v. Hunter,* 336 U.S. 684 (69 SC 834, 93 LE2d 924) (1949), which, in our opinion, does not constitute authority for the proposition cited.

dentiary insufficiency. Aside from the alleged impropriety in extrajudicial statements made by the prosecutor, which we review in Division 2, infra, there are only two arguable instances of prosecutorial misconduct: (1) the *Brady* violation found to have existed in *Williams I,* and (2) the prosecution's failure to produce the emergency-room admitting sheet as part of the autopsy report, which, if the appellant is correct in his contentions, would also constitute a *Brady* violation, as well as a violation of OCGA § 17-7-211.

(A) As to the *Brady* violation found to have existed in *Williams I,* the trial judge was authorized in concluding that this did not constitute intentional prosecutorial misconduct.

In any event, it has been held that actions of the prosecutor constituting even intentional prosecutorial misconduct do not raise the bar of double jeopardy, notwithstanding the fact that the defendant was thereby deprived of due process of law, unless the prosecutor's actions were intended to subvert the protections afforded by the Double Jeopardy Clause. See *Fugitt v. State,* supra; *Oregon v. Kentucky,* supra. Perhaps the most heinous form of prosecutorial misconduct, which also constitutes one type of *Brady* violation, consists of the prosecutor's knowing use of perjured testimony to obtain a conviction, and, even in that situation, retrial has not been held to be barred by the Double Jeopardy Clause. See *United States v. Agurs,* 427 U.S. 97 (96 SC 2392, 49 LE2d 342) (1976); *Mooney v. Holohan,* 294 U.S. 103 (55 SC 333, 79 LE 780) (1935).

Thus, the *Brady* violation found to have existed in *Williams I* cannot be said to raise the bar of double jeopardy.

(B) As to the emergency-room form, the evidence shows that this document was not a part of the prosecutor's file. Under such circumstances, a prosecutor is generally not chargeable with a *Brady* violation for failure to produce such a document. See *Worth v. State,* 183 Ga. App. 68

(3b) (358 SE2d 251) (1987); *Baker v. State,* 245 Ga. 657 (3) (266 SE2d 477) (1980); *Hicks v. State,* 232 Ga. 393 (207 SE2d 30) (1974). See also *United States v. Eley,* 355 FSupp. 353, 358 (N.D. Ga. 1972).

In addition, as previously noted, it would appear that such hospital record is not a part of an autopsy report. See n. 2, supra.

In any event, for reasons previously given, it is clear that any error on the part of the prosecution in failing to produce this document cannot be classified as prosecutorial misconduct barring retrial of the appellant under the Double Jeopardy Clause.

(C) In addition, as previously noted, the defense raised no objection to the omission of this form until a subpoena issued by the defense during the course of the third trial produced the information. And, at the third trial the appellant utilized this newly-discovered information in his defense, and he did not request a mistrial or a continuance in order to obtain additional time for investigation. As stated earlier in this opinion, the third trial terminated as a result of the jury's inability to reach a unanimous verdict, and it is well known that retrial under these circumstances is not barred by the Double Jeopardy Clause. E.g., *Glass v. State,* 250 Ga. 736 (2) (300 SE2d 812) (1983); *Cameron v. Caldwell,* 232 Ga. 611 (208 SE2d 441) (1974); OCGA § 16-1-8 (e) (2)(C).

2. In primary reliance upon the statements made by the prosecutor to the press following the third trial, the appellant argues that the impropriety chargeable to the prosecutor as a result thereof, when combined with other alleged incidences of prosecutorial misconduct in this case, establishes an inability on the part of the prosecutor and his staff to perform their prosecutorial duties, thereby requiring the grant of the appellant's disqualification motion.

(A) In this regard, DR 7-107 of Rules and Regulations of the State Bar of Georgia provides, in pertinent part,

that generally a lawyer participating in or associated with the investigation of a criminal matter shall not make or participate in making an extra-judicial statement that a reasonable person would expect to be disseminated by means of public communication, unless the communication does nothing more than state without elaboration certain enumerated categories of information, including "information contained in a public record." DR 7-107 (A)(1); 252 Ga. at 629. An extra-judicial statement with respect to the prosecutor's or defense counsel's opinion as to the guilt or innocence of the accused, the evidence, or the merits of the case is expressly prohibited. DR 7-107 (B)(6); 252 Ga. at 630. However, the provisions of DR 7-107 do not preclude a lawyer from replying to charges of misconduct publicly made against him. DR 7-107 (I); 252 Ga. at 630.

Not surprisingly, it has been held that where defense counsel makes an improper jury argument or tenders inadmissible evidence at trial, such error does not authorize the prosecuting attorney to commit any offsetting error in an attempt to rectify the error chargeable to the defense. *Jones v. State,* 14 Ga. App. 568 (81 SE 801) (1914); *Bennett v. State,* 86 Ga. 401 (12 SE 806) (1890); *Nixon v. State,* 14 Ga. App. 261 (80 SE 513) (1914). A contrary view would, of course, tend to eviscerate the rules of trial practice and procedure in criminal cases.

In a line of cases relied upon by the appellant, it has been held repeatedly, consistent with DR 7-107 (B)(6), that although it is permissible for a prosecuting attorney to argue to the jury that the facts proven lead to the conclusion that the defendant is guilty, *Parks v. State,* 254 Ga. 403 (330 SE2d 686) (1985); *Bland v. State,* 210 Ga. 100 (78 SE2d 51) (1953), it is, however, improper for a prosecuting attorney to express his personal opinion in the presence of the jury that the defendant is guilty, in that such opinion is not legal evidence and cannot, therefore, be thrust into the case. *Hoerner v. State,* 246 Ga. 374 (4) (271 SE2d 458) (1980); *Iler v. State,* 139 Ga. App. 743 (3)

(229 SE2d 543) (1976); *Nixon v. State,* supra; *United States v. Brunberger,* 431 F2d 1062 (2nd Cir. 1970). "Where, however, the objection [to this] is sustained and the district attorney apologizes, there is normally no abuse of discretion in denying a motion for mistrial [predicated upon the prosecuting attorney's objectionable statement to the jury]." *Iler v. State,* supra, 139 Ga. App. at 744. But see *Powell v. State,* 179 Ga. 401 (176 SE 29) (1934).

The appellant's disqualification motion is similar to his double jeopardy plea, in that here, as there, it is a quantum leap from any conclusion that extra-judicial statements made by the prosecutor were improper, to the holding that disqualification of the prosecutor is required as a result thereof.

As argued by the prosecutor, the extra-judicial statements uttered by him did constitute an explanation as to the legitimacy of reprosecution of the appellant based upon the three trials which had been conducted and the overwhelming votes of the jurors in favor of conviction therein. Implicit within our decision in *Williams I,* and as explicitly held in *Williams II,* the evidence introduced at both of these trials was sufficient to authorize a rational trier of fact in concluding beyond a reasonable doubt that appellant committed the murder. And, no argument has been made that the evidence admitted at the third trial was insufficient as a matter of law.

However, the prosecutor's comment concerning the "right result" can be said to have constituted an impermissible expression by the prosecutor of his opinion concerning the merits of the case.

(B) There are two generally recognized grounds for disqualification of a prosecuting attorney. The first such ground is based on a conflict of interest, and the second ground has been described as "forensic misconduct." In re. J.S., 436 A2d 772, 774 (Vt. 1981) (Billings, J., dissenting), citing Note, *The Nature and Consequences of Fo-*

rensic Misconduct in the Prosecution of a Criminal Case, 54 Colum. L. Rev. 946 (1954).

A conflict of interest has been held to arise where the prosecutor previously has represented the defendant with respect to the offense charged, or has consulted with the defendant in a professional capacity with regard thereto; such conflict also has been held to arise where the prosecutor has acquired a personal interest or stake in the defendant's conviction. See *Vermont v. Hohman,* 420 A2d 852 (Vt. 1980).[4] See also *Fugitt v. State,* supra.

One of the primary examples of "forensic misconduct" consists of the improper expression by the prosecuting attorney of his personal belief in the defendant's guilt. See *Vermont v. Hohman,* supra. In determining whether an improper statement of the prosecutor as to the defendant's guilt requires his disqualification, the courts have taken into consideration whether such remarks were part of a calculated plan evincing a design to prejudice the defendant in the minds of the jurors, or whether such remarks were inadvertent, albeit improper, utterances. Cf., *Pierce v. United States,* 86 F2d 949 (6th. Cir. 1936), with *Dunlop v. United States,* 165 U.S. 486 (17 SC 375, 41 LE 799) (1897).

(C) Here, it is quite clear that any improper remarks made by the prosecutor were not of such egregious nature as to require his disqualification.

Judgment affirmed. All the Justices concur.

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[4] In *Hohman,* the prosecutor was disqualified for conflict of interest, because he had pledged in his reelection campaign to obtain a conviction against the defendant. Thus, there is no clear demarcation line between conflict of interest and forensic misconduct, and a given ground for disqualification of the prosecutor might be classifiable as either.

APPENDIX C

In the Supreme Court of Georgia

June 14, 1988

45351. WILLIAMS v. THE STATE

The Motion for Reconsideration was denied today.
All the justices concur.